CANTELME & BROWN, P.L.C.

A Professional Liability Company
3003 N. Central Avenue, Suite 600
Phoenix, Arizona 85012-2902
Tel (602) 200-0104 Fax (602) 200-0106
E-mail: djc@cb-attorneys.com /
dbrown@cb-attorneys.com
David J. Cantelme, Bar No. 006313
D. Aaron Brown, Bar No. 022133
Samuel Saks, Bar No. 024260

SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren Street
Phoenix, Arizona 85004-2202
Telephone: (602) 382-6000
E-Mail: mliburdi@swlaw.com
Michael T. Liburdi, Bar No. 021894
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Wesley W. Harris, *et al.*,

Plaintiffs,

v.

Arizona Independent Redistricting Commission, *et al.*,

Defendants.

Case No. CV 12-0894-PHX-ROS

PLAINTIFFS' SUPPLEMENTAL BRIEF PURSUANT TO ORDER OF JULY 8, 2013

Assigned to District Judges Silver and Wake and Circuit Judge Clifton

I. INTRODUCTION.

The IRC's central, and effectively only, defense has been that it depopulated Democrat-dominated districts and overpopulated Republican-dominated districts intentionally to avoid retrogression and to ensure compliance with Section 5 of the Voting Rights Act ("VRA").[1] TE 395, at 118:19-119:17.[2] Plaintiffs have claimed

[1] *See, e.g.*, IRC Motion to Dismiss (doc. 40, filed 8/3/12) at 9:21-27.
[2] "TE" refers to trial exhibits. "RT" refers to transcripts of the trial.

throughout this case that the VRA cannot constitute a justification for a partisan pattern of deviation as a matter of law. If there was ever any doubt on this point, the decision in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013), has removed it. Furthermore, since the IRC did not draw any of their Hispanic ability-to-elect districts in compliance with *Bartlett v. Strickland*, 556 U.S. 1 (2009), they cannot rely on the VRA at all as a defense to any claim. In short, Plaintiffs' one person one vote claim is fully ripe for decision, and no claim of judicial economy could possibly warrant foregoing this decision after the recent trial and briefing. In addition, compelling evidence adduced at trial exposed the IRC's Section 5 defense as an artifice. Districts 24 and 26, and especially District 8, as the IRC constructed them, added nothing to compliance with Section 5 or to the avoidance of retrogression, but they did give the Democrats seven more seats at the Legislature. Judged by actual election results over the last decade, the 2002 Benchmark plan had six Hispanic ability-to-elect districts and one Native-American ability-to-elect district,[3] and both the 2011 draft plan and the 2012 IRC-enacted plan slightly exceeded the Benchmark with Districts 2, 3, 4, 7, 19, 27, 29, and 30. Section 5 required no more, and could not form the support needed to construct Districts 8, 24, and 26. After *Shelby County*, Section 2 is the only basis for constructing any minority district which deviates from the Arizona neutral redistricting criteria. Section 2 demands the construction of ability-to-elect districts with at least 50% +1

[3] The predecessor IRC's 2002 submission to DOJ (TE 1) claimed seven Hispanic ability-to-elect districts (Districts 13, 14, 16, 23, 24, 25, and 27) and one Native American district (District 2.) But in its 2012 DOJ submission, TE 530-83, the current IRC identified only seven Benchmark ability-to-elect districts: District 2 as a Native-American ability-to-elect district, and Districts 13, 14, 15, 16, 27, and 29 as Hispanic ability-to-elect districts. The IRC cited actual election results to account for the difference. In light of *Shelby County*, any dispute over what constituted an appropriate benchmark district and an appropriate Section 5 district is irrelevant, unless that district also complied with the standards of Section 2 embodied in *Bartlett*, 556 U.S. at 19, which none of the IRC Hispanic districts did. *Id.*

minority CVAP. *Bartlett*, 556 U.S. at 19. Districts 8, 24, and 26, fall far short of 50% +1 minority CVAP—as does every other purported Hispanic district in the IRC plan. As a result, they count for nothing towards satisfying the VRA. For Section 5, they were always either artifice or supererogation. For Section 2, they are duds.

Nonetheless, if one takes the artifice as truth for the sake of analysis, *Shelby County* demolishes the IRC's defense and leaves only ruins. While Section 5 remains a fortress against retrogression, Section 4 is the key to opening that fortress and *Shelby County* melted down that key. Without Section 4, no one can unlock Section 5, and it will remain locked away from use until Congress amends the VRA to forge a new Section 4 to replace what *Shelby County* turned to dross. For this case, *Shelby County* removes even the slimmest of doubt as to whether Section 5 afforded shelter to the IRC's deliberate vote dilution. It did not and could not.

Even before *Shelby County*, it was clear that Section 5 could not justify deliberate vote dilution. Congress never authorized vote dilution as a tool to advance compliance with Section 5, and it expressly denounced such a use of Section 5 when it re-enacted the VRA in 2006. S. Rep. 109-295, at 17. The DOJ never claimed Section 5 served as a justification for vote dilution, and in fact conceded that it did not. TE 34. Both Congress and the DOJ recognized that the Fourteenth Amendment is not at war with itself and that it profits little to protect the voting rights of one group of citizens at the cost of diluting the votes of other citizens. If one ignores Congress and the DOJ, and accedes to the IRC argument that Section 5 justifies vote dilution, *Shelby County* knocks down the argument. With Arizona no longer tethered to Section 5, the IRC's purported Section 5-compliance cannot condone its vote dilution, if it ever did. Thus, *Shelby County* makes Plaintiffs' federal claims of vote dilution even more compelling.

Regarding *Pullman* abstention, *Shelby County* enervates what's left of the argument after the Court rejected it in the order of February 22, 2013, and makes it even

less appealing now. Plaintiffs came to federal court to vindicate federal rights. *Pullman* abstention, which is not jurisdictional, *Growe v. Emison*, 507 U.S. 25, 32 n.1 (1993), should be sparingly invoked in voting cases. *Badham v. U.S. Dist. Court for the N. Dist. of Cal.*, 721 F.2d 1170, 1171 (9th Cir. 1983). With the case under advisement since last April 10, and nomination petitions for the 2014 primary due on May 28, 2014,[4] less than a year away, it is not feasible for Plaintiffs to start all over in state court, where they cannot obtain meaningful relief to vindicate their constitutional rights against intentional vote dilution in time for the 2014 elections. Experience belies the efficacy of abstention. The 2002 Benchmark Plan generated seven years of litigation, up and down the state courts, before reaching a final conclusion in *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Independent Redistricting Comm'n*, 208 P.3d 676 (Ariz. 2009). This case has been tried, has been at issue for more than 100 days, involves constitutional rights, and should be decided.

Furthermore, the two key redistricting cases on this issue, *Growe* and *Scott v. Germano*, 381 U.S. 407 (1965), require deferral, not abstention when a state court is actively preparing a remedial plan in a deadlock redistricting situation. These cases clarify that it is still incumbent upon the federal court to ensure a constitutional redistricting map in time for upcoming elections. In situations where a state court is actively preparing a remedial map, a federal court should wait and review the state court map for federal issues. That is not the situation here. There is no deadlock, and the state has in fact produced a map, which is in force and is before this Court. Plaintiffs have proved that the IRC engaged in an intentional unconstitutional pattern of population deviation that diluted votes. While it is clear under the law and facts that Section 5 was never a defense to the pattern of population deviation, the *Shelby County*

[4] http://www.azsos.gov/election/2014/Info/ImportantDates.htm.

case has eliminated any possible reliance on Section 5 by the IRC. Accordingly, this case should be expeditiously decided in favor of Plaintiffs so the IRC has adequate time to develop remedial maps for the 2014 elections.

II. *SHELBY COUNTY*.

A. The Lead Up.

When Congress originally passed the VRA in 1965, it provided "extraordinary measures to address an extraordinary problem." *Shelby County*, 133 S. Ct. at 2618. It designed Section 2

> to forbid, in all 50 States, any 'standard, practice, or procedure ... imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.' . . . [I]njunctive relief is available in appropriate cases to block voting laws from going into effect. . . . . Section 2 is permanent, [and] applies nationwide . . . .

Shelby County, 133 S. Ct. at 2619 (citations omitted.)

> Section 5 brewed up even stronger medicine, and was intended to cure
>
> entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'

Shelby County, 133 S. Ct. at 2615 (citation omitted). What made such racism even more cancerous was its resistance to ordinary remedies:

> Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States 'merely switched to discriminatory devices not covered by the federal decrees,' 'enacted difficult new tests,' or simply 'defied and evaded court orders.'

Id. at 2624. The elixir was preclearance, which a jurisdiction could obtain "only by proving that the change had neither 'the purpose [nor] the effect of denying or abridging the right to vote on account of race or color.'" *Shelby County*, 133 S. Ct. at 2620 (citation omitted). The Supreme Court recognized preclearance was a drastic remedy that "imposes substantial federalism costs and differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.* at 2621 (internal

quotation marks omitted.) In that vein, preclearance upset the ordinary balance between the federal and state governments:

> The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to 'negative' state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause.

Id. at 2623. Thus, preclearance was "intended to be temporary . . . to expire after five years." *Id.* at 2620. Yet the Supreme Court repeatedly upheld the VRA and its reauthorizations. *Id.* As the Court explained in rejecting the initial challenge to the VRA, "'exceptional conditions can justify legislative measures not otherwise appropriate.' [*South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).]" *Id.* at 2618

Congress used Section 4 to subject jurisdictions to Section 5's curative. *Id.* at 2619-20. Initially, Section 4 swept several states and one county in Arizona within Section 5's coverage for preclearance. *Id.* at 2620. Arizona as a whole came into the picture in 1975 when Congress expanded the reach of Section 4 and

> amended the definition of 'test or device' to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English. § 203, *Id.* at 401–402. As a result of these amendments, the States of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota, became covered jurisdictions. See 28 C.F.R. pt. 51, App.

Shelby County, 133 S. Ct. at 2620. Congress "correspondingly amended Sections 2 and 5 to forbid voting discrimination on the basis of membership in a language minority group, in addition to discrimination on the basis of race or color." *Id.*

In 2006, Congress re-enacted the VRA and extended its life for another 25 years. The reauthorization significantly strengthened Section 5's already strong medicine:

> Section 5 now forbids voting changes with 'any discriminatory purpose' as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, 'to elect their preferred

candidates of choice.' 42 U.S.C. §§ 1973c(b)-(d).

Shelby County, 133 S. Ct. at 2621.

Four years ago, an earlier challenge was brought against Section 5's strong medicine in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009). There, the Court "concluded that the 'coverage formula' raise[d] serious constitutional questions." *Id*. at 204. The reason was that "a statute's 'current burdens' must be justified by 'current needs,' and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets.'" *Shelby County*, 133 S. Ct. at 2627 (quoting *Northwest Austin*, 557 U.S. at 203.) Despite these constitutional misgivings, the Court decided the case on statutory-construction grounds, deferring the constitutional questions to another day. 557 U.S. at 207. Nonetheless, "[e]ight Members of the Court subscribed to these views, and the remaining Member would have held the Act unconstitutional." *Shelby County*, 133 S. Ct. at 2621. Thus, *Northwest Austin* set the stage for *Shelby County*.

B. *Shelby County's* Effect on the Voting Rights Act.

Section 4's original coverage depended on a two-pronged test: a) the use of a "test or device as a prerequisite to voting as of November 1, 1964," and (b) "less than 50 percent voter registration or turnout in the 1964 Presidential election." *Shelby County*, 133 S. Ct. at 2619. In 1970, Congress reauthorized the Act for another five years and "extended the coverage formula in Section 4(b) to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. That swept in several counties in California, New Hampshire, and New York." *Id.* (citations omitted.) In 1975, Congress reauthorized the Act to cover language minorities and jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972. *Id.* In 1982, Congress reauthorized the Act for another 25 years but did not amend Section 4's coverage formula. *Id.* The 2006 reauthorization extended the Act

another 25 years but again left the Section 4 coverage formula intact. The upshot was that the core of Section 4 coverage remained largely as it had been for 48 years.

When the Supreme Court upheld the 1965 Act, despite the Act's costs to federalism, state sovereignty, and equal footing of the states, and despite the Act's transfer to the federal government of the unprecedented right to "negative" state law, it did so because "the formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both." *Id*. at 2627 (citations omitted.)

Because the Section 4 formula stayed largely unchanged for 48 years, the Court in 2013 could no longer remain confident that the formula properly targeted the ills it sought to cure. In this respect, the Court observed that, in light of the 2006 strengthening of the Act, "the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved." *Id*. at 2627. As a result, the "coverage formula met that test in 1965, but no longer does so." *Id.* Here was Section 4's denouement in *Shelby County*:

> Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. § 6, 84 Stat. 315; § 102, 89 Stat. 400. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.
>
> In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

Id. at 2627-2628. Thus, the Supreme Court struck down Section 4's coverage formula, holding that "[t]he formula in that section can no longer be used as a basis for subjecting

jurisdictions to preclearance." *Id*. at 2631.

What did *Shelby County* do to the rest of the VRA? The Supreme Court explained the range of its decision as follows:

> Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an extraordinary departure from the traditional course of relations between the States and the Federal Government. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

Id. at 2631 (citations and quotation marks omitted.) A fair reading is that Section 2 remains as strong as ever, Section 4's formula is gone, and Section 5 fizzles without the Section 4 formula.

C. *Shelby County* and Retroactivity.

As a general rule, rulings in civil cases, including constitutional rulings, apply retroactively unless the court expressly announces a prospective application. Applying this rule in *Harper v. Virginia Department of Taxation*, the Supreme Court held that, "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." 509 U.S. 86, 96 (1993); *accord Nunez-Reyes v. Holder*, 646 F.2d 684, 690 (9th Cir. 2011) ("[A] court's decisions apply retroactively to all cases still pending before the courts.") This default rule applies unless the court announcing the rule states otherwise. *Harper*, 509 U.S. at 97-98. Once a court announces a new rule, other courts should not second-guess the prior decision where the express prospective language is not included in the decision. *Florez-Lopez v. Holder*, 685 F.3d 857, 866 n.3 (9th Cir. 2012).

Courts apply this rule to a broad range of civil cases. *See, e.g., Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995) (statute of limitations); *In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061 (9th Cir. 2011) (standing under the bankruptcy code); *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994) (preclusive effect of civil service judgments).

Nowhere in *Shelby County* did the Court indicate that its holding would not have retroactive effect. It thus applies with full force to this case. Indeed, *Shelby County* was clearly foreshadowed by the Supreme Court's decision in *Northwest Austin.*[5] This decision gave the IRC notice that its reliance on Section 5 likely would not be justified, and the IRC should have factored this into its decision-making process.

Under the rule of retroactivity, decisions that invalidate unconstitutional laws apply to government decisions made prior to the ruling and at a time when the government's decisions were legal under the then-existing law. To illustrate, in *Davis v. Michigan Department of Treasury*, the Supreme Court struck down a state tax scheme because it violated the constitutional doctrine of intergovernmental tax immunity. 489 U.S. 803 (1989). Under this scheme, Michigan exempted from taxation all retirement

---

[5] For instance, in *Shelby County*, 133 S. Ct. at 2630, the Chief Justice noted:

> In other ways as well, the dissent analyzes the question presented as if our decision in *Northwest Austin* never happened. For example, the dissent refuses to consider the principle of equal sovereignty, despite *Northwest Austin*'s emphasis on its significance. *Northwest Austin* also emphasized the "dramatic" progress since 1965, 557 U.S., at 201, 129 S.Ct. 2504, but the dissent describes current levels of discrimination as "flagrant," "widespread," and "pervasive," *post*, at 2636, 2641 (internal quotation marks omitted). . . . Although *Northwest Austin* stated definitively that "current burdens" must be justified by "current needs," *ibid.*, the dissent argues that the coverage formula can be justified by history, and that the required showing can be weaker on reenactment than when the law was first passed.

benefits paid by the state or its political subdivisions while taxing those paid by the Federal government. *Id.* at 808-17. *Harper* arose out of a similar tax exemption for state and local employees in Virginia. 509 U.S. at 91. Virginia repealed its exemption following *Davis*, and federal employees in the state sought a refund of taxes they paid before *Davis* was decided. *Id.* The Virginia Supreme Court denied the taxpayers relief. *Id.* at 91-92. The U.S. Supreme Court reversed because Virginia improperly failed to give *Davis* full retroactive effect. *Id.* at 92-93. The Court explained that new rules apply to all events at issue in pending cases, "regardless of whether such events predate or postdate [the court's] announcement of the rule." *Id.* at 97. In so doing, the Court made it possible for the taxpayers to obtain relief from the government, even though the government's actions were lawful at the time they were taken.

This principle is even more important here, because of the unusual way in which Section 5 is written and operates. Section 5 does not preempt or invalidate state and local laws. It only prevents the enforcement or implementation of a law until it has received preclearance from either the District Court for the District of Columbia or the Department of Justice. In essence it operates as a statutory injunction. As a result of *Shelby County*, any such injunction or threat of such injunction against Arizona has been removed. Thus, the practical result of *Shelby County* is a return to normal operation of law. The VRA is still in force nationally through Section 2, and locally the IRC is bound by the Section 2 standard that it earlier had ignored.

In this case, the IRC cannot use the timing of *Shelby County* as a shield. Arizona was previously subject to Section 5 solely by virtue of Section 4's coverage formula. That formula has been deemed invalid. Because *Shelby County* applies retroactively, the formula was also invalid when the IRC was creating the maps at issue. Absent the coverage formula, Arizona could not be properly subject to Section 5, and the IRC could not justify its actions by reference to Section 5.

III. THE EFFECT OF *SHELBY COUNTY* ON THIS CASE.

The IRC represented that it depopulated Democrat-dominated districts and overpopulated Republican-dominated districts to ensure compliance with Section 5. TE 547, ¶ 21; RT, Day 4, at 873:10-21; RT, Day 3, at 776:22-771:1. As noted above, the facts adduced at trial indicated that Section 5 compliance was an artifice shielding the IRC's deliberate strengthening of the Democratic Party at the Legislature.

What's more, this argument was not tenable even before *Shelby County*. The Fourteenth Amendment does not allow one of its provisions or applications to be elevated or given precedence over another.[6] Congress had no power to authorize the use of compliance with Section 5 as a justification for deliberately depopulating Democrat-dominated districts and overpopulating Republican-dominated districts.[7] Congress never authorized depopulation of districts as an attempt to satisfy Section 5, and in fact the Committee Reports accompanying the 2006 reauthorization condemned such a practice.[8] The DOJ guidelines warned against it as well.[9]

---

[6] *See Ullman v. United States*, 350 U.S. 422, 428 (1956) ("As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion."); *Prout v. Starr*, 188 U.S. 537, 543 (1903) ("The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity."); *Marbury v. Madison*, 1 Cranch. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect . . . ."); *Tom v. Sutton*, 533 F.2d 1101, 1105-06 (9th Cir. 1976) ("Every provision in a constitution must be interpreted in the light of the entire document; and all constitutional provisions are of equal dignity and, if possible, should be construed in harmony with each other.") (citations omitted) (construing a tribal constitution); *Arizona Minority Coalition*, 208 P.3d at 687, ¶ 35, n. 10 ("[T]he the constitution does not establish primary and subordinate goals . . . .")

[7] *See City of Boerne v. Flores*, 521 U.S. 507, 518-19 (1997) ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.")

[8] *See, e.g.*, S. Rep. 109-295, at 17 ("It is perverse to think that, under the guise of enforcing voting rights, the Justice Department was forcing States to violate citizens' constitutional voting rights.")

Yet if the evidence is put aside and the IRC representation is assumed true for analysis, and if one remains unconvinced by the Fourteenth Amendment, by the Committee Reports accompanying the 2006 reauthorization, and by the DOJ Guidelines, *Shelby County* removes all doubt as to whether it was constitutional to deliberately depopulate Democrat-dominated districts and overpopulate Republican-dominated districts to comply with Section 5. It was not constitutional or legal.

The 1975 reauthorization and Section 4 amendments first tethered Arizona to Section 5 and preclearance. *Shelby County* cut the tether, and Arizona is not subject to preclearance or to Section 5. It will take a new act of Congress to restore Arizona to Section 5's coverage. Because *Shelby County* is retroactive, it reaches back and removes even a scintilla of doubt as to whether it was constitutional to deliberately and intentionally depopulate Democrat-dominated districts and overpopulate Republican-dominated districts to comply with Section 5. It was not.

IV. THE EFFECT OF *SHELBY COUNTY* ON STATE LAW.

Shelby County has no direct effect on Arizona state law. Proposition 106, ARIZ. CONST., art. 4, pt. 2, § 1(14)(A), requires the IRC to comply with the VRA as one part of the six criteria guiding map drafting. Proposition 106 takes the VRA as is, and *Shelby County* cuts the tie between Section 5 and Arizona or any other specific jurisdiction. Thus, *Shelby County* neither adds to nor detracts from Proposition 106.

What's more, as Plaintiffs contended, there should be no practical difference for legislative redistricting purposes whether Section 5 applies to Arizona or not, because in Arizona's circumstances the standard for constructing ability-to-elect districts is the same under Section 2 as under Section 5, and Section 2 continues to apply unabated to

---

[9] Guidance Concerning Redistricting under Section 5 of the Voting Rights Act; Notice," 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011) ("Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle.")

Arizona, and the rest of the country, as *Shelby County* itself recognized. There are two reasons for this conclusion.

First, "when the number of districts remains the same or increases by one: there is no retrogression as long as the number of ability districts remains the same." *Texas v. United States*, 887 F.Supp.2d 133, 157 (D.D.C. 2012). The number of Arizona legislative districts has been fixed at 30 for at least the last 40 years. 1972 ARIZ.SESS.LAWS S.C.R. 1001. Thus, Section 5 did not require Arizona to create more ability-to-elect districts than what existed in the Benchmark Plan. The IRC already met the Benchmark Plan with districts 2, 3, 4, 7, 19, 27, 29, and 30. Districts 8, 24, and 26 added nothing towards satisfying Section 5. To draw an analogy, it's why the home team does not play the bottom half of the ninth inning when it is ahead. Any additional runs add nothing to the result.

Second, contrary to whatever advice the IRC may have received from Mr. Adelson, the IRC could not use cross-over or influence districts to satisfy Section 5, because all of Arizona's districts were newly-created:

> By contrast, a state creating a 'new' crossover or coalition district simply anticipates, or hopes, that the minority population in the new district will align politically and coalesce with other groups of voters to elect its candidates of choice. It would be extremely difficult to confirm that minority voters would indeed have the ability to elect in the newly formed district. Since potential new crossover-coalition districts are 'subject to [this] high degree of speculation and prediction,' *Bartlett*, 129 S.Ct. at 1245, they can rarely be deemed ability districts in a proposed plan.

Texas v. United States, 831 F.Supp.2d 244, 268 (D.D.C. 2011). That left the IRC with one option: to create majority-minority districts, and only majority-minority districts, to satisfy Section 5's non-retrogression requirement. A majority-minority district requires 50% +1 minority CVAP. *See Bartlett*, 556 U.S. at 19 ("The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the *voting population* and could constitute a compact voting

majority but, despite racially polarized bloc voting, that group is not put into a district." (emphasis added.)

Thus, compliance with Section 5 did not justify the creation of Districts 8, 24, and 26, which fell far short of 50% +1 minority CVAP, even before *Shelby County* was decided. But *Shelby County* did remove all reasonable doubt as to whether Section 5 compliance justified the IRC's deliberate depopulation of Democrat-dominated districts and overpopulation of Republican-dominated districts. It did not and could not.

Shelby County will, however, have one huge effect on legislative districts if they are redrawn as a result of this case. Under *Bartlett*, the remedial map created by the IRC will have to be dramatically different from the map that was presented to this Court. The IRC will be presented with a choice: it can either strictly adhere to the city and county line and other neutral provisions of Arizona law or comply with *Bartlett*'s 50% +1 CVAP requirement. Either way, the map will be significantly different. As a result, the contrast between what should have been drawn under *Shelby County* and *Bartlett* and what the IRC actually drew dramatically demonstrates the discriminatory effect of the IRC's vote dilution. No mere tinkering with deviations at the margins will suffice, because the state criteria and Section 2 require far greater change.

V. *SHELBY COUNTY* MAKES THE CASE FOR ABSTENTION WEAKER.

On December 17, 2012, the IRC moved to stay this case, based on *Pullman*-abstention, pending resolution of Plaintiffs' state-law claim in state court. (doc. 76). The matter was briefed and argued, and the Court denied the motion on February 22, 2013. (doc. 134.) The Court's instant order (doc. 222) requested further briefing on the abstention issue in light of *Shelby County*. The short answer is that *Shelby County* makes abstention less appealing under the circumstances of this case than it was when the Court denied the abstention motion on February 22. The reason is that *Shelby County* removes all doubt as to whether Section 5 justified the IRC's deliberate dilution

of Plaintiffs' votes. Of the four forms of abstention,[10] only *Pullman*-type abstention has any potential for fitting the facts in this case, and that is the form of abstention the IRC originally relied on. As shown below, on the facts of this case, the Court again should reject *Pullman* abstention, which is never jurisdictional and is always discretionary.

A. *Shelby County* Has No Effect on Plaintiffs State-Law Claim.

Plaintiffs made one state-law claim in this case: that the population deviations among legislative districts violated Proposition 106's equal population clause, found in ARIZ. CONST. art. 4, pt. 2, § 1(14)(B). Second Amended Complaint (doc. 55) at ¶ 166. The equal-population clause provides that "legislative districts shall have equal population to the extent practicable." Plaintiffs made no other state-law claims. *Id.*[11] On the IRC's motion based on the Eleventh Amendment (doc. 66), this Court dismissed the state-law claim (doc. 134), and Plaintiffs have not re-filed it in state court.

For its part, the IRC has argued that Proposition 106's equal-population provision is coterminous with the Fourteenth Amendment's one-person/one-vote principle. IRC Motion to Dismiss (doc. 40, filed August 3, 2012) at 14:14-23. It based that argument on *Ariz. Minority Coalition*, 208 P.3d at 686, ¶ 32, though it later

---

[10] "Abstention is variously recognized as: (1) Pullman–type abstention, to avoid decision of a federal constitutional question when the case may be disposed of on questions of state law; (2) Burford–type abstention, to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to avoid duplicative litigation, now frequently referred to as Colorado River–type abstention." 20 Charles Alan Wright and Mary Kay Kane, FED. PRAC. & PROC. DESKBOOK § 54 (updated through April 2013).

[11] The IRC itself recognized the limited nature of Plaintiffs' state-law claim:

> With the exception of the Arizona Equal Population Goal, Plaintiffs do not claim that the Commission failed to comply with the complex, state-constitutional procedural and substantive requirements that govern the Commission's work.

IRC Motion to Dismiss (doc. 40, filed August 3, 2012) at 9:8-11.

conceded at oral argument of the motion to dismiss, held on October 31, 2012, that *Ariz. Minority Coalition*'s observation on this point was *dicta*.

The difference in positions between Plaintiffs and the IRC regarding Proposition 106's equal population clause can be summarized as follows: Plaintiffs contend that the clause means what it says, and that the IRC could have, and therefore should have, drawn districts of equal population, just as it did with congressional districts. The IRC contends the equal-population clause gives it the same flexibility and discretion as is found in the Fourteenth Amendment's one-person/one-vote principle. *Shelby County*, however, says nothing about which of these positions reads Proposition 106 correctly.

B. *Shelby County* Undermines the Case for Pullman-Abstention.

Pullman-abstention is not jurisdictional, and is better described as a stay of the federal court's hand while state authorities resolve a redistricting dispute. *Growe*, 507 U.S. at 32 n.1. The process is illustrated by *Germano*, in which the federal courts stayed the case before them, retained jurisdiction, and awaited action by state authorities, which might have resolved the dispute and made a federal decision moot. 381 U.S. at 409. Courts are reluctant, however, to apply the doctrine to voting cases:

> [T]he Supreme Court has demonstrated a reluctance to order abstention in cases involving certain civil rights claims, such as voting rights, . . . racial equality, . . . and first amendment rights of expression. Many courts have expressed concern that in some cases the delay caused by abstention may effectively deny plaintiffs their constitutional rights.
> The dangers posed by an abstention order are particularly evident in voting cases. The right to vote is fundamental because [it is] preservative of all rights . . . Other rights, even the most basic, are illusory if the right to vote is undermined. In addition, delay in such cases is particularly insidious. In a redistricting case such as this, for example, the courts' failure to act before the next election forces voters to vote in an election which may be constitutionally defective. Although a subsequent court may strike down the apportionment plan, there is no procedure for removing from office the officials elected under the defective plan. Moreover, these officials may acquire advantages of incumbency that may be difficult for their opponents to overcome in future elections held

> under a constitutionally valid plan. Thus, a delayed decision in such a case strike[s] at the heart of representative government. Given these special dangers of delay, courts have been reluctant to rely solely on traditional abstention principles in voting cases.

Badham, 721 F.2d at 1172-73 (case citations and quotation marks omitted.)

Turning to the test for *Pullman*- abstention, it has been described as follows:

> (1) The complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.
> (2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.
> (3) The possibly determinative issue of state law is doubtful.

Id. at 1172 (quotation marks omitted.) The Ninth Circuit has put forth an additional consideration, which it has described, without deciding, as either a fourth prong or background against which the three earlier prongs should be evaluated:

> The fundamental importance of the right to vote and the special dangers posed to that right by delay require a different approach to abstention orders in voting rights cases. We need not decide whether this different approach is in essence a separate requirement or merely a background against which to apply the traditional three-part test. *We do hold that before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote.* Although we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote.

Id. at 1173 (emphasis added.) This test is applied to the totality of circumstances:

> In summary, the extraordinary decision to stay federal adjudication requires more than an ambiguity in state law and a likelihood of avoiding constitutional adjudication. A district court must carefully assess the totality of circumstances presented by a particular case. This requires a broad inquiry which should include consideration of the rights at stake and the costs of delay pending state court adjudication. Because of the complexity of factors which guide a particular decision on *Pullman* abstention, we have often held that a decision of the district court will be reversed on appeal only upon a showing of an abuse of the discretion entrusted to a trial court.

Duncan v. Poythress, 657 F.2d 691, 697 (5th Cir.1981).

Plaintiffs' opposition (doc. 89) to the IRC's initial motion to stay analyzed in depth why a claim of *Pullman*-abstention was not properly made on the facts of this case, and Plaintiffs adopt their reasoning and arguments herein by reference. For the sake of efficiency, Plaintiffs will not repeat those arguments, other than to emphasize again the District of Maryland's reasoning in rejecting a similar argument:

> Defendants argue that if the [Maryland State] Court of Appeals were to invalidate the plan, either on federal or state grounds, its decision would nullify or at least modify the rulings which we are called upon to make. However, the reverse is likewise true. If we were ultimately to overturn the redistricting plan on federal grounds, decisions which the Court of Appeals had made in the interim might be nullified or substantially altered. This would prove to be particularly unfortunate if, before we acted, a revised plan had been established, pursuant to a directive of the Court of Appeals, based upon premises concerning federal law which we subsequently invalidated. Were that to occur, the valuable time and resources of the Court of Appeals would be wasted, and unnecessary friction between the State and Federal courts might ensue.

Marylanders for Fair Representation, Inc. v. Schaefer, 795 F.Supp. 747, 749 (D.Md. 1992) (three-judge court).

The focus of this supplemental brief, which Plaintiffs believe to be the focus the Court wanted in its order of July 8, 2013, is whether *Shelby County* makes any difference or revives the notion of abstention, which the Court rejected in its order of February 22, 2013. It does not. As outlined above, if *Shelby County* has any effect on this case, it is to eliminate any reasonable doubt about whether Section 5 could justify the IRC's deliberate underpopulation of Democrat-dominated districts and overpopulation of Republican-dominated districts, and the elimination of such doubt does not add to the case for abstention. It weakens the case.

Because *Shelby County* demolishes the IRC's defense, it makes Plaintiffs' federal constitutional claim for relief for vote dilution all the more compelling. In turn,

that should make the federal courts' already acute concern for voting rights even sharper, because *Shelby County* shreds what's left of the Section 5 fig leaf that the IRC had used to cover its dilution of Plaintiffs' voting rights.

This case has gone through extensive motion practice, the commissioners have been deposed and all testified, the case has been tried, and the factual and legal issues have been developed and briefed extensively, before trial and after trial. The case has burned hundreds of thousands of dollars in legal fees on both sides and has consumed enormous amounts of time from a three-judge panel. It has been at issue more than 100 days. Most critically, it involves some of the most precious rights of citizenship under our constitution. It is ripe for decision, and a decision should be made.

VI. CONCLUSION.

Shelby County cuts the line between Arizona and Section 5, and thereby destroys the IRC's already insupportable rationale for deliberately underpopulating Democrat-dominated districts and overpopulating Republican-dominated districts. *Shelby County* applies retroactively, it makes no difference to Plaintiffs' lone state-law claim, and it does nothing to revive the already-rejected case for abstention. Plaintiffs respectfully request that, upon the conclusion of supplemental briefing, the Court proceed to decision of this case and render judgment for Plaintiffs declaring the IRC's legislative plan unconstitutional and enjoining its enforcement for the 2014 election.

///

///

///

RESPECTFULLY SUBMITTED on July 19, 2013.

CANTELME & BROWN, P.L.C.

By: /s/ David J. Cantelme, SBN 006313
3003 N. Central Avenue, Suite 600
Phoenix, AZ 85012
Tel (602) 200-0104
Fax (602) 200-0106
E-mail: djc@cb-attorneys.com

Attorneys for Plaintiffs

SNELL & WILMER L.L.P.

By: /s/ Michael T. Liburdi, SBN 021894
One Arizona Center
400 E. Van Buren Street
Phoenix, Arizona 85004-2202
Telephone: (602) 382-6000
Fax: (602) 382-6070
E-Mail: mliburdi@swlaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2013, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a notice of electronic filing to the EM/ECF registrants appearing in this case.

/s/ Samuel Saks
Samuel Saks